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Before the

**SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-286 (Sub-No. 5X)

**THE NEW YORK, SUSQUEHANNA AND WESTERN RAILWAY CORPORATION**

**- DISCONTINUANCE OF SERVICE EXEMPTION -**

**IN BROOME AND CHENANGO COUNTIES, NY**

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**REPLY TO  
NEW YORK STATE DEPARTMENT OF TRANSPORTATION  
PETITION FOR STAY**

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**Attorneys for The New York, Susquehanna  
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**Dated: September 26, 2008**

Before the  
**SURFACE TRANSPORTATION BOARD**  
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**PETITION FOR STAY**

On August 12, 2008, The New York, Susquehanna and Western Railway Corporation ("NYS&W") filed a notice of exempt discontinuance in accordance with the provisions of 49 CFR §1152 Subpart F. The line that is the subject of this proceeding is an approximately 41-mile section of NYS&W's Utica Main line of railroad in upstate New York. The last local service on the line was over five years ago, the line has been out of service as a result of flood damage since June, 2006. Although the line qualifies for the Board's out-of-service abandonment exemption, NYS&W has elected only to seek only discontinuance authority at this time, leaving the tracks in place and, absent seeking abandonment authority in the future, foregoing the opportunity to remove and salvage the line. The discontinuance is scheduled to become effective on October 1, 2008. *See The New York, Susquehanna and Western Railway Corporation- Discontinuance of Service Exemption - In Broome and Chenango Counties, NY*, STB Docket No. AB-286 (Sub-No 5X) (served August 29, 2008).

On September 8, 2008, New York State Department of Transportation ("NYSDOT") filed an unverified letter petition (the "Petition") requesting that the effective date of the

discontinuance be stayed <sup>1</sup> NYS&W files this Reply requesting that the Petition be denied on the grounds that:

- (1) The Petition does not comply with the Board's filing requirements. As an unverified letter, no evidence has properly been put in the record to justify a stay. As discussed more fully below, the unverified "facts" presented by the Petition contain errors and are otherwise irrelevant.
- (2) NYSDOT has not alleged any defects in the notice of exemption, nor has it asked that the discontinuance authority be revoked. Accordingly, it has presented no circumstances to justify a stay.
- (3) NYSDOT has not satisfied its burden of establishing the conditions justifying a stay. Indeed, the Petition does not address any of the standards for a stay adopted by the Board.

NYSDOT's Petition raises issues arising from what otherwise would be a private contractual issue between NYS&W and NYSDOT over the questions of in what circumstances and in what amounts railroads may be required to repay NYSDOT for grants provided for rail line improvements under the terms of contracts between the State and the railroad. Those issues have nothing to do with whether NYS&W should be permitted to discontinue its service obligations with respect to the line because of the lack of traffic and cost of restoration of the line, likewise, the proposed discontinuance has no bearing on the private contractual dispute.

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<sup>1</sup> On September 18, 2008, County of Chenango Industrial Development Agency ("IDA") filed a Petition to Reopen, Reject and/or Revoke Exemption. NYS&W will be filing a separate reply to the IDA's Petition.

### **Factual Background**

Although it is clear, as discussed below, that NYSDOT has not satisfied the criteria for a stay, NYS&W believes that the Board should be aware of some of the many factual inaccuracies in the Petition so that the record will be complete <sup>2</sup>

The Petition does not take issue with any of the certifications in NYS&W's notice of exemption – principally, that there has been no local service for over five years, and that all overhead traffic has been rerouted without complaint. Indeed, the Petition acknowledges that the line suffered catastrophic damage in the flooding of June, 2006, and that repairs to this line would cost \$400,000. Petition at 1-2 (NYS&W's estimates were actually that the repairs would cost *in excess of* \$400,000. See Petition, Exhibit C (NYS&W June 25, 2007 letter) <sup>3</sup>) As a result of the extensive damage, NYS&W was forced to embargo the line. NYS&W sought funds under New York's Freight and Passenger Rail Assistance Program for assistance in restoring the line. Despite some initial indications that such funding would be available, none has been granted to NYS&W.

When it became clear that funds would not be available for restoring the line, NYS&W initially planned to abandon the line. It filed a new System Diagram Map listing the line in category 1, and notified NYSDOT, Chenango County Industrial Development Agency and other public officials of its concern for the future viability of the line and NYS&W's willingness to cooperate with interested parties to explore opportunities to preserve the line for future use.

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<sup>2</sup> The facts set forth in this section are based upon the attached Verified Statement of Nathan R. Fenno, President of NYS&W ("Fenno V S")

<sup>3</sup> Total damages to NYS&W's lines as a result of the flood were in excess of \$1,400,000. Petition at 2. NYS&W repaired over \$1,000,000 of damage to other areas of its lines. Petition, Exhibit C

Various public agencies and officials asked NYS&W to keep the line intact and to explore alternatives to abandonment. *See, for example*, Schumer letter dated June 19, 2007, attached as Exhibit A to Fenno V S.

NYS&W met with NYSDOT on several occasions, including the November 2007 meeting referenced in the Petition. NYS&W's recollection of that meeting differs from the statement in NYSDOT's letter filing, however, it is irrefutable that NYSDOT never formally responded to NYS&W's written requests regarding the line. NYS&W decided to proceed with a discontinuance instead of an abandonment, to preserve the line and right-of-way intact, and alleviate concerns about salvage of the line and reversion of the right-of-way. NYSDOT was informed of this decision by letter dated July 29, 2008. Exhibit B to Fenno V.S

NYS&W agrees that the contract terms attached as Appendix B to the Petition are representative of the terms of various funding agreements between the railroad and NYSDOT. However, NYS&W does not agree that those are the only relevant provisions, or that those provisions indicate that NYS&W has breached the contracts. Significantly, there is a *force majeure* clause that excuses NYS&W from certain obligations that result from causes outside its control, including flooding. *See* Exhibit D to Fenno V S. NYSDOT acknowledges that NYS&W was in compliance with the agreements before the June 2006 flooding, and that its obligations were relieved following the flooding. Petition at 2-3. There is disagreement between the parties about whether that relief continues under the *force majeure* clause.

NYSDOT also alleges that NYS&W has failed to seek its permission before seeking "discontinuance" authority. Yet the language of the contracts requires permission only with respect to "abandonment" authority, discontinuance requires only the authority of the Board. *Compare* Section 2.7 a and 2.7c (Petition, Exhibit B). As acknowledged by NYSDOT, NYS&W

did seek permission from NYS&W when it planned to abandon the line (Petition at 3, ¶ 3.11) However, because with a discontinuance the improvements are left in place, there is no need to seek permission

Further, while the Petition raises concerns about what will happen if it were determined that NYS&W has breached the contracts, it dismisses as inadequate NYS&W's prior proposal that it be permitted to abandon the line and reuse the materials on project elsewhere on NYS&W's system (saving the cost of buying new materials on those projects) However, the NYSDOT's July 18, 2007 letter (Petition, Exhibit D) acknowledges that the State has allowed this in other similar circumstances. Further, the Petition ignores the provisions of Section 2.7 of the contract (Petition, Exhibit B), that protects the interest of NYSDOT in the event of a possible breach by retaining ownership of the materials that were installed <sup>4</sup>

#### **Discussion**

##### **A. The Petition does not meet the Board's filing requirements.**

The Board's regulations contemplate that general rules of evidence will apply in determining what will be admissible 49 CFR §1114.1 In the context of this Petition, the general rules of evidence would require that the facts put forth before the Board to justify the request for a stay, be in the form of an affidavit or verified statement See Federal Rule of Civil Procedure 43(b) (on a motion, facts outside the record should be by affidavit or oral testimony), Federal Rules of Evidence 602 (testimony must be based on personal knowledge) and 603 (witness must make declaration by oath or affirmation), and 49 CFR §1104.5 (Board

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<sup>4</sup> It is also important to note that by proceeding with a discontinuance instead of an abandonment, NYS&W is not violating the prohibitions in Section 2.6 (Petition, Exhibit B) against selling, relinquishing or disposing of the project facilities while title remains with NYSDOT

requirements for affirmation in lieu of oath) The attorney's signature serves as a certification only that he believes there are grounds for the relief requested, but does not verify the facts that are included in the pleading. 49 CFR §1104.4. Thus, since NYSDOT did not properly submit an affidavit or verified statement to certify the facts alleged, the Board should not admit any of the alleged facts into evidence. Without any evidence to justify the stay request, the Petition should be denied.

**B. NYSDOT has not alleged any defects in the notice of exemption.**

NYSDOT has not raised any grounds for reopening, reconsidering or revoking the exemption. Rather, it has asked for a stay for the purposes of resolving a contractual dispute with NYS&W. The dispute does not involve any factors relating to whether NYS&W is entitled to discontinuance authority. As the Board has held in similar circumstances

[T]he petitioner is asking us to stay the exemption merely to allow it to study the effects of a loss of rail service and right-of-way so that Berkshire can decide if it wishes to oppose the abandonment. Neither our regulations nor our governing statute provide for stays of abandonment proceedings for such a reason. Berkshire has not shown (or even alleged) that the notice was defective or that we should reconsider and revoke the exemption.

*New York Central Lines, LLC – Abandonment Exemption – In Berkshire County, MA*, STB Docket No. AB-565 (Sub-No. 3X) (by the Chairman) (served September 5, 2001). NYSDOT's Petition should likewise be denied.

**C. NYSDOT has not satisfied its burden of establishing the conditions required for a stay.**

The Board has adopted standard criteria to be applied in evaluating a request for a stay.

The factors to be considered in addressing a motion for stay are: (1) whether there is a strong likelihood that petitioners will prevail on the merits; (2) whether petitioners would be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest.

Hilton v Braunskill, 481 U.S. 770, 776 (1987); Washington Metro Area Transit Comm'n v Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977), Va Petroleum Jobbers Ass'n v. Fed Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). Parties seeking a stay carry the burden of persuasion on all of the elements required for a stay. See generally Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

*The Kansas City Southern Railway Company – Abandonment Exemption – Line in Warren County, MS*, STB Docket No. AB-103 (Sub-No. 21X) (served February 28, 2008)

In this instance, NYSDOT has failed to make any showing under these standards, or even attempted to address any of the criteria. However, if those criteria were examined, it is clear that NYSDOT would not be able to meet its burden of demonstrating that a stay is required.

As discussed above, NYSDOT has not raised any grounds for reopening, reconsidering or revoking the exemption, and therefore it cannot succeed on the merits. Rather, NYSDOT's focus is on the potential breach of certain funding agreements between NYSDOT and NYS&W if the discontinuance were permitted. As discussed in the Factual Background above, whether or not this is the case is disputed. NYS&W does not believe that NYSDOT will succeed on its claims, but in any event, the determination of contract issues is a matter for state courts, and not for the Board.

Likewise, the Board may not resolve any dispute over the payment for maintenance of the excepted track because courts are the proper forum for the interpretation of such private agreements. See Saginaw Bay Southern Railway Company – Acquisition and Operation Exemption – Rail Line of CSX Transportation, Inc., STB Finance Docket No. 34729, slip op. at 3 (STB served May 5, 2006) (Board is not proper forum to resolve private contractual disputes).

*Northwestern Pacific Railroad Company – Change in Operators Exemption – North Coast Railroad Authority, Sonoma-Marín Area Rail Transit District and Northwestern Pacific Railway Co., LLC*, STB Finance Docket No. 35073 (served September 7, 2007). Thus, it is clear that NYSDOT will not prevail on the merits in any claim before the Board.



NYSDOT has also not demonstrated irreparable harm. NYSDOT asserts that as a result of the alleged breach, it has a claim for monetary damages. However, economic loss alone does not constitute "irreparable harm" when considering a stay. See *The New York, Susquehanna and Western Railway Corporation – Abandonment Exemption – Portion of the Edgewater Branch in Bergen County, NJ*, ICC Docket No. AB-286 (Sub-No. 2X) (served July 23, 1991) (citing *Wisconsin Gas Co. v FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Further, because NYS&W has elected to seek discontinuance rather than abandonment authority, the track and right-of-way will remain intact, available for future rail use if the need should arise. Thus, there is no risk of reversion as there would be in the case of an abandonment, and allowing the discontinuance will not result in any irreparable harm.

On the other hand, the grant of a stay would adversely affect NYS&W and is not required by the public interest. Given the lack of traffic on the line, and its condition, the line is unnecessary at this time, and is a drain on NYS&W's resources. Discontinuance of the line would allow NYS&W to be relieved of its common carrier obligations with respect to the line, allow it to terminate the embargo, and concurrently relieve NYS&W of its required FRA inspections and related expenses. Delay of the requested discontinuance exemption would frustrate the goals of the railroad transportation policy, including minimizing the need for Federal regulatory control, promoting a safe and efficient rail transportation system, reducing regulatory barriers to exit, and providing for expeditious handling and resolution of all proceedings. 49 USC §10101(2),(3), (7),(15)

Thus, even if NYSDOT had attempted to address the standards for a stay, it is clear that the circumstances in this proceeding do not support a stay.

**D. NYS&W has properly sought an exemption to discontinue service over the line.**

The line has not had any local service for over five years. NYS&W continued to use the line for overhead traffic until July, 2006, when flooding severely damaged the line. NYS&W re-routed the overhead traffic over a connecting CSX Transportation line, and embargoed the damaged line.

Embargoes temporarily excuse carriers from their common carrier obligations, but as the Board has recently reiterated, they should not be used in lieu of formal abandonment discontinuance of the line. Due to the extent of the flood damage, it soon became clear to NYS&W that there was insufficient traffic to justify private restoration of the line. Accordingly, the line was placed in category 1 on NYS&W's system diagram map (*see* SDM-286 (filed November 11, 2006)). NYS&W sought funds under New York's Freight and Passenger Rail Assistance Program to restore the line, despite some initial indications that such funding would be available, none has been forthcoming. Additionally, NYS&W advised affected parties, including NYSDOT, Chenango County Industrial Development Agency and other public officials of its concern for the future viability of the line and NYS&W's willingness to cooperate with interested parties to explore opportunities to preserve the line for future use. NYS&W received requests from various officials not to abandon or dismantle the line. After the line had been out of service for more than two years, NYS&W proceeded with this discontinuance proceeding in order to comply with its understanding of its obligations under federal law and the Board's regulations and rulings.<sup>5</sup> By seeking authority to discontinue service, NYS&W seeks to

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<sup>5</sup> Indeed, after the notice of exempt discontinuance was filed, NYS&W received an informal inquiry from the Section Chief of the Board's Rail customer and Public Assistance Program concerning the status of NYS&W's embargo of the line.

relieve itself of its current common carrier obligations, but allow the various public officials interested in the line and transportation policy in the region additional time to explore opportunities to preserve the line and right of way for possible future development of rail-served businesses that would justify restoration.

The line clearly meets the Board's requirements for the out-of service class exemption as set forth in 49 CFR §1152 Subpart F – there has been no local service for over two years (no service for over five years, for over three years before the line was embargoed), all overhead traffic has been rerouted, there had been no formal complaints filed by a user of rail service on the line regarding cessation of service over the line filed with the Board or any US District Court during the two year period (or the five year period of no local service)

#### **Conclusion**

For all of the foregoing reasons, NYS&W requests that NYSDOT's petition for a stay be denied.

Respectfully submitted,



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THORP REED & ARMSTRONG, LLP  
Once Commerce Square  
2005 Market Street, Suite 1910  
Philadelphia, PA 19103  
(215) 640-5000

Attorneys for The New York, Susquehanna  
and Western Railway Corporation

Dated September 26, 2008

## **VERIFIED STATEMENT OF**

**NATHAN R. FENNO**

My name is Nathan R. Fenno. I am currently the President of The New York, Susquehanna and Western Railway Corporation ("NYS&W"). I was elected as President in May, 2007. Prior to that, I served for twenty years as General Counsel of NYS&W. In these positions, I am personally familiar with the line that is the subject of this proceeding, the discussions that have taken place with New York State Department of Transportation ("NYSDOT"), Chenango County Industrial Development Authority and other public officials, and the agreements between NYSDOT and NYS&W.

As a result of severe flooding in June, 2006, NYS&W's lines in upstate New York suffered over \$1,400,000 of damages. NYS&W repaired over \$1,000,000 of damaged lines to preserve and restore services to its customers. The portion of the Utica Branch between Chenango Forks and Sherburne that is the subject of this proceeding, had not had any local traffic since 2003, and was not repaired. NYS&W embargoed the line, and rerouted the traffic from the northern end of the Utica Branch above Sherburne onto other lines. NYS&W sought funds under New York's Freight and Passenger Rail Assistance Program for assistance in restoring the line. NYS&W received some initial indications that its requests would be favorably reviewed, however, to date no funding has been made available by NYSDOT.

As an alternative, NYS&W explored abandonment of the line. In November 2006, it filed a new System Diagram Map with the Board in Docket No. SDM-286. It notified NYSDOT, Chenango County Industrial Development Authority and other public officials of its concern about the future viability of the line, and preservation of the line for future development opportunities. NYS&W asked NYSDOT for permission to abandon the line. Various public

officials asked NYS&W to keep the line intact and to explore alternatives to abandonment, including U.S. Senator Charles Schumer See letter dated June 19, 2007, attached as Exhibit A.

NYS&W continued to meet with NYSDOT through November, 2007 In that meeting, the parties discussed a number of issues and alternatives, including funding of restoration, and abandonment and re-use of State-funded materials on other lines No formal conclusion to those discussions has ever occurred

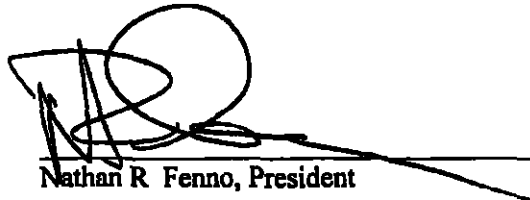
Not having heard further from NYSDOT, concerned about further extension of the embargo, and with no other local developments, NYS&W decided to proceed with the alternative of discontinuance of service over the line Discontinuance would allow NYS&W to be relieved of its common carrier (and related financial) obligations with respect to the line, while preserving all of the State-funded improvements and the right-of-way intact for future development – the goals of NYSDOT and local officials as we understood them I notified NYSDOT by letter of the decision in July, 2008 See letter dated July 28, 2008, attached as Exhibit B I have reviewed the Petition filed by NYSDOT, and its allegations the NYS&W, by filing for discontinuance has violated various funding agreements between NYSDOT and NYS&W Although the question of whether these contracts have been violated is not for the Board to determine, there are provisions of these contracts beyond the ones attached by NYSDOT that should be brought to the Board's attention Attached as Exhibit C are provisions showing NYS&W's required contributions with respect to this contract, and *force majeure*. (For case of comparison, I have included provisions from the same contract cited by NYSDOT )

Although there are substantial public investments that have been made in this line over the years (the contracts cited in the Petition go back to 1984), NYS&W has provided substantial matching funding as well Abandonment of the line would allow NYS&W to salvage the

materials and either re-use them on its lines, or sell them to third parties – allowing repayment to NYSDOT for its remaining investment (if that is what it chooses), as well as a return to NYS&W for its remaining investment. However, NYS&W has elected to seek only discontinuance authority at this time so that the line will be left in place, the right-of-way can remain intact, and all parties can continue to explore opportunities for business along the line. NYS&W continues to meet cooperatively with NYSDOT and Chenango County Industrial Development Authority officials (as recently as Wednesday, September 24, 2008) to discuss the future of this line.

I hereby verify under penalty of perjury, that the foregoing Verified Statement is true and correct. Further, I certify that I am qualified and authorized to file this Verification

Executed on September 25, 2008.



Nathan R. Fenno, President

**Fenno Verified Statement**

**Exhibit A**

Schurner letter dated June 19, 2007



CHARLES E. SCHUMER  
NEW YORKCOMMITTEES  
BANKING  
JUDICIARY  
RULES  
FINANCE

## United States Senate

WASHINGTON, DC 20510

June 19, 2007

Mr Walter Rich  
President  
New York Susquehanna and Western Railway  
1 Railroad Avenue  
Cooperstown, NY 13326

Dear Mr. Rich,

I write to you today regarding an important economic issue for the people of Chenango County, NY. The New York Susquehanna & Western Railway (NYS&W) is a vital lifeline for the many communities that stretch from Utica to Binghamton. After the recent flooding, which decimated so much of New York State, I sympathize with your plight of operating a business and providing services to the affected communities. That being said, I have been informed that the Railway recently filed a System Diagram Map with the Surface Transportation Board (STB), the first step in abandoning a rail line. I request that you delay furthering this process to enable Chenango County leaders to put together a plan to preserve the rail.

The preservation of these rail lines is essential for attracting new businesses to the area. The presence of rail in a rural area to ship goods is a crucial bargaining tool, when a business is deciding where to locate. For example, prior to the June flooding, Endicott Biofuels LLC, a large producer of biodiesel, was prepared to build a plant in Chenango County. Such an industry required accessibility to rail line for successful operations. In the future, rail will be crucial as the county continues to try to lure business to the region.

Chenango County leaders feel it is critical that a viable rail line remain in this area. Currently, in conjunction with community representatives and business leaders they are evaluating various options to achieve this goal, including the operation of a scenic train during the day, and industrial rail operations at night. As you know, the flooding left a segment of the rail line seriously damaged. County leaders are also considering different methods of raising funds to make necessary repairs of the line.

However, if NYS&W proceeds with the abandonment process, Chenango County will not have enough time to enact a proposal. Under STB regulations, NYS&W has two years from the time it submitted the System Diagram Map before it needs to submit a Notice of Intent, the next step in the abandonment process. In light of this time frame, affording Chenango County some additional planning time will not exclude you from moving forward in the abandonment process. However, this additional time will enable the county to fully consider their options and provide an excellent opportunity for Chenango County to turn this rail line around. I ask that you will give them that chance.

Thank you for your attention to this letter. If you have any further questions or concerns, please do not hesitate to contact Sam Schaeffer, in my office, at (212) 486-4430.

Sincerely,

A handwritten signature in black ink that reads "Chuck Schumer". The signature is written in a cursive, flowing style.

Charles E. Schumer  
United States Senator

**Fenno Verified Statement**

**Exhibit B**

**Fenno letter dated July 29, 2008**

**FILE COPY**

**THE NEW YORK, SUSQUEHANNA AND WESTERN RAILWAY CORPORATION**

**1 Railroad Avenue  
Cooperstown, NY 13326  
607-547-2555 ph.  
607-547-5658 fax  
www.nysw.com**

**Nathan R. Fenno  
President  
[nfenno@nysw.com](mailto:nfenno@nysw.com)**

July 29, 2008

Raymond F. Hessinger, P.E., Acting Director  
Office of Integrated Modal Services  
Freight Bureau  
NYS Department of Transportation  
50 Wolf Road, POD 54  
Albany, NY 12232

RE Utica Main

Dear Ray


I wanted to write you with a small update regarding the status of the out-of-service portion of NYS&W's Utica line. As you will recall, we met and discussed various options for this portion of the Utica line during 2007. Since then, we have continued to work with the Chenango County Industrial Development Agency which, we understand, has hired a consulting firm to study and examine alternate outcomes for the line.

Recently, we were able to identify an opportunity to use a portion of the northern end of the line, which has little to no damage, as a location to store empty railroad cars. We expect we will store up to 500 railroad cars between North Norwich and Sherburne. This opportunity has presented us a way to generate some revenue from the line which helps us to continue to delay making more permanent decisions regarding ultimate disposition of the property.

In order to satisfy federal legal requirements, we have also decided to move forward with a "discontinuance" petition regarding the out-of-service portion of the line. As I am sure you are aware, a discontinuance application, if granted, will formalize the fact that there is no current rail service on the line, it will not allow the line to be salvaged.

Please feel free to call me if you have any questions in this regard.

Sincerely,



Nathan R. Fenno  
President

NRF ksp

**Fenno Verified Statement**

**Exhibit C**

**Additional Contract Provisions**

**(Contract No, D014370)**

\* \* \*

WHEREAS, it has been determined to be in the best interest of the public to make said five million, one hundred thousand dollars (\$5,100,000) available to the New York, Susquehanna & Western Railway Corporation and for those capital improvements used in connection herewith

WHEREAS, an additional one million dollars (\$1,000,000) from the Passenger and Freight Preservation Program for State Fiscal Year 2003-2004 is anticipated to be made available by the Department of Transportation when appropriated for the payment of the STATE's share of a rail project to be undertaken in accordance with the provisions of the aforesaid Section 14 of the Transportation Law, and

\* \* \*

WHEREAS, the New York, Susquehanna & Western Railroad is providing two million dollars (\$2,000,000) in their own funding to contribute to those capital improvements used in connection herewith

\* \* \*

#### **Section 3 6 Force Majeure**

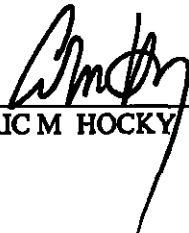
The obligations of the parties hereunder shall be subject to force majeure (which shall include strikes, riots, floods, acts of God, and other causes or circumstances beyond the control of the party claiming such force majeure as an excuse for non-performance), but only as long as , and to the extent that, such force majeure shall prevent performance of such obligations.

**CERTIFICATE OF SERVICE**

I hereby certify that on this date a copy of the foregoing Notice of Abandonment was served on the following persons by e-mail

Robert A Rybak  
Division of Legal Affairs  
State of New York, Department of Transportation  
rrybak@dot.state.ny.us

John D Heffner, Esq  
John D Heffner, PLLC  
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Washington, DC 20006  
jheffner@verizon.net

  
\_\_\_\_\_  
ERIC M HOCKY

Dated September 26, 2008